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THE UNREVIEWABILITY OF EMERGENCY ORDERS OF THE FEDERAL AVIATION AGENCY—THE CONCEPT OF PREVENTIVE ADMINISTRATIVE PROCEEDINGS

HENRY M. SCHMERER*

And the rule of the law, it is argued is preferable to that of any individual. . . . [But] there may indeed be cases which the law seems unable to determine . . . and appoints [officers] to determine matters which are left undecided by it, to the best of their judgment.

ARISTOTLE, POLITICS, Bk. III, Ch. 16

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I. INTRODUCTION

A. *The Federal Aviation Agency*

Two commercial airliners collided in mid-air over the Grand Canyon, killing 128 people, on June 30, 1956. This and other air tragedies were part of the momentum which resulted in Congressional enactment on August 23, 1958,¹ of the Federal Aviation Act of 1958² [herein-

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1. 2 WEST, FEDERAL PRACTICE MANUAL § 1801 (1960); Comment, 57 MICH. L. REV. 1214 (1959).

2. 72 Stat. 731 [hereinafter cited as Act], 49 U.S.C. §§ 1301-1542 (1958). The forerunner to the Act was the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. Since most of the provisions in both acts are substantially the same, cases interpreting the 1938 Act will be cited.

after referred to as the Act] creating the Federal Aviation Agency [hereinafter referred to as the FAA] as an independent agency of the government to promote air safety.³ The FAA is headed by an Administrator who exercises all powers and has complete responsibility for the agency,⁴ which in 1962 had 43,000 employees⁵ and a budget of 729.8 million dollars.⁶

The Act also provides for the continuation of the Civil Aeronautics Board [hereinafter referred to as the CAB], with one of its functions being the review of the Administrator's orders involving safety certificates.⁷ There appears to be no constitutional barrier preventing Congress from creating agencies to regulate air safety affecting interstate commerce to the exclusion of state regulation.⁸

B. The Emergency Powers

The emergency powers of the Administrator under the Act are in sections 609⁹ and 1005(a).¹⁰ They have been considered to be of an "awesome nature,"¹¹ since the Administrator's emergency orders are effectual without prior notice or hearing, and they remain in effect during appeal.

Section 609, set out in the margin,¹² gives the Administrator the

3. Act § 103, 49 U.S.C. § 1303 (1958). "It promotes safety through certification of airmen, aircraft, and such air agencies as flight and ground schools, and checks the design, structure, and performance of new aircraft to insure the safety of the flying public." FEDERAL AVIATION AGENCY, STATISTICAL HANDBOOK OF AVIATION 1 (1961). See generally 2 WEST, FEDERAL PRACTICE MANUAL §§ 1801-52 (1960).

4. Act § 301(a), 49 U.S.C. § 1341(a) (1958); *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

5. THE FEDERAL AVIATION AGENCY 2 (U.S. Gov't Printing Office 0-609549, 1961) (pamphlet).

6. FEDERAL AVIATION AGENCY, THIRD ANNUAL REPORT 50 (1961).

7. Act § 609, 49 U.S.C. § 1429 (1958). The CAB's largest function is the economic regulation of aviation. It also has the duty of accident investigation and the determination of probable cause of accidents. See 2 WEST, FEDERAL PRACTICE MANUAL § 1804 (1960).

8. *Rosenhan v. United States*, 131 F.2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943); *cf. United States v. Drumm*, 55 F. Supp. 151 (D. Nev. 1944). The constitutional source is based on the commerce clause as opposed to a national ownership of air space. *Braniff Airways, Inc. v. Nebraska State Bd.*, 347 U.S. 590 (1954) (dictum); *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956) (dictum). See also *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929 (N.D. Ohio 1930), *modified*, 55 F.2d 201 (6th Cir. 1932).

9. 49 U.S.C. § 1429 (1958).

10. 49 U.S.C. § 1485(a) (1958).

11. *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588, 591 (5th Cir. 1962), *petition for cert. filed*, 31 U.S.L. WEEK 3221 (U.S. Jan. 3, 1963) (No. 719). The Attorney General has approved the exercise of emergency powers by the Administrator. Leonard J. Spect, 25 C.A.B. 859, 891 (1957), *aff'd*, 254 F.2d 905 (8th Cir. 1958).

12. AMENDMENT, SUSPENSION, AND REVOCATION OF CERTIFICATES SEC. 609. The Administrator may, from time to time, reinspect any civil aircraft, aircraft, engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the

power to amend, suspend, modify, or revoke any airman, aircraft, or air production certificate when the Administrator determines that "safety in air commerce or air transportation and the public interest" requires the action. If the Administrator advises the certificate holder as to the emergency, no hearing is necessary. An aggrieved person may file an appeal with the CAB which stays the effectiveness of the Administrator's order unless the Administrator notifies the CAB that an emergency exists. In that event, the CAB must dispose of the appeal within sixty days after receiving the notice.¹³ In all cases, the CAB's order is subject to judicial review in the courts of appeals.¹⁴

Section 1005(a), set out in the margin,¹⁵ permits the Administrator

Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006 [49 U.S.C. § 1486], and the Administrator shall be made a party to such proceedings. 49 U.S.C. § 1429 (1958).

13. The forerunner of this provision was Civil Aeronautics Act of 1938, ch. 601, § 609, 52 Stat. 1011, as amended, Reorganization Plan No. 111 of 1940, 54 Stat. 1233, permitting the Administrator of Civil Aeronautics to make suspensions only in emergency situations for a maximum of two 30 day periods. See Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies, Part 6*, S. Doc. No. 10, 77th Cong., 1st Sess. 48-49 (1941).

14. Act § 1006, 49 U.S.C. § 1486 (1958). The Administrator cannot appeal from an adverse CAB order. *Lee v. Civil Aeronautics Bd.*, 225 F.2d 950 (D.C. Cir. 1955). *Contra, id.* at 952 (dissenting opinion by Judge Prettyman). The Administrator can appeal to the CAB from an adverse order of the CAB's examiner. *Spect v. Civil Aeronautics Bd.*, 254 F.2d 905 (8th Cir. 1958).

15. EFFECTIVE DATE OF ORDERS; EMERGENCY ORDERS SEC. 1005(a). Except as otherwise provided in this Act, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided*, That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further*, That the Administrator shall immediately

whenever he "is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce" to make "just and reasonable orders" without the necessity of giving notice or hearing or following any other usual procedure. Upon issuing an emergency order the Administrator has the duty to "immediately initiate proceedings relating to the matters embraced in any such order."¹⁶

The legislative history of the Act¹⁷ is silent as to the existence of any distinctions between the emergency powers in sections 609 and 1005. One distinction could be that they are *different* power sources—section 1005 being used for more drastic action. For instance, the Administrator might want to maintain the emergency order after sixty days had expired and the CAB had not acted on the appeal.¹⁸ Another distinction could be that they are *redundant* sections—neither having greater weight than the other. Another possible distinction is that they are *dependent* on one another—section 1005 creating the power and section 609 implementing the procedure to be used. These distinctions could create problems. For instance, since only section 1005 uses the word "opinion," the Administrator might be able to use more discretion if he acted under that section instead of section 609. In another situation section 609 could be more helpful to the Administrator since he could decide a situation is an emergency at the time the certificate holder appeals to the CAB even though the original notice affecting the certificate did not say it was an emergency.¹⁹ If the Administrator acts under both sections at the same time, distinctions between the two sections could probably be avoided. Therefore, both will be considered as giving rise to the same discretionary exercise of power.

C. The Problems Confronting Certificate Holders

Since an emergency order of the Administrator could be operative for sixty days or longer, the certificate holder could claim irreparable injury²⁰ as a result of the Administrator acting without authority or acting in an arbitrary or capricious manner.²¹

initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this Act. 49 U.S.C. § 1485(a) (1958).

16. The forerunner of this provision was the Civil Aeronautics Act of 1938, ch. 601, § 1005(a), 52 Stat. 1023, as amended, Reorganization Plan No. IV of 1940, § 7, 54 Stat. 1235, limiting the emergency power to the CAB.

17. LEGISLATIVE HISTORY OF THE FEDERAL AVIATION ACT OF 1958 (Gov't Printing Office) (compilation of congressional reports); [1958] 2 U.S. CODE CONG. & ADM. NEWS 3741.

18. Compare Leonard J. Spect, 25 C.A.B. 859, 891 (Order E-11187, 1957), *aff'd as to other orders*, 254 F.2d 905 (8th Cir. 1958). See also Propeller Service Corp. 13 C.A.B. 555 (1952); Regina Cargo Airlines, Inc. 13 C.A.B. 511, 515 (1950).

19. See Nadiak v. Civil Aeronautics Bd., 305 F.2d 588 (5th Cir. 1962), *petition for cert filed*, 31 U.S.L. WEEK 3221 (U.S. Jan. 3, 1963) (No. 719).

20. "[T]he suspension would destroy property, not a license property but investment and business property." Standard Airlines, Inc. v. Civil Aeronautics Bd., 177 F.2d 18 (D.C. Cir. 1949).

21. In Nadiak v. Civil Aeronautics Bd., *supra* note 19, at 591, the court labeled the

An air carrier or a parts overhaul shop might allege irreparable injury in that the public will react adversely to an alleged safety violation, public relations will be impaired, large expenditures of time and money will be necessary to defend the charge, employee morale will decline, and, especially with irregular air carriers²² or small overhaul shops, financing arrangements will be jeopardized.²³ Airmen or mechanics might allege loss of reputation and livelihood as a result of an emergency order.²⁴

While the CAB has sixty days to dispose of the appeal, it will not review or stay the emergency order prior to the hearing on the merits as to the final disposition of the case.²⁵ Nor will the CAB take into account financial losses resulting from an emergency order.²⁶ The sole relief the CAB will give, in cases in which the CAB enters a final order of suspension, is credit for the period the certificate was suspended on an emergency basis.²⁷ Thus, any immediate relief, if available, lies with the courts.²⁸

Some of the problems to be considered when relief is sought in the courts are:²⁹ Can the FAA take emergency action? Is the Administrator personally liable for misuse of his authority? What forms of relief are available? Do the courts of appeals have jurisdiction? May a district court take jurisdiction? To what extent may a court review the order? And finally, the ultimate question—Should an emergency order by the Administrator of the FAA relating to safety in the air be subject to review by any court?

II. BASIS FOR EMERGENCY ACTION IN AMERICAN JURISPRUDENCE

A. *In General*

What constitutional students call procedural due process—the right

charges listed by the Administrator as a "blunderbuss." See text accompanying notes 182-88 *infra*.

22. Different safety regulations are applicable to the various holders of CAB economic certificates. See 14 C.F.R. pts. 40, 42, 45 (1962).

23. See *Twentieth Century Airlines, Inc. v. Ryan*, 74 Sup. Ct. 8 (Reed, Circuit Justice, 1953).

24. See Glenn T. Andrews, 29 C.A.B. 1496 (1959), where a loss of several thousand dollars on a planned fishing trip was alleged. See also *Nadiak v. Civil Aeronautics Bd.*, *supra* note 19.

25. Leonard J. Spect, *supra* note 18; Richard S. Ewing, 26 C.A.B. 816 (1957) (by implication).

26. Glenn T. Andrews, 29 C.A.B. 1496 (1959).

27. *Ibid.*; Charles M. Griffin, Jr., 13 C.A.B. 524 (1951).

28. A dramatic method of calling the court's attention to the order is by resisting it and then asserting as a defense the invalidity of the order. See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.07 (1958) [hereinafter cited DAVIS]; JAFFE & NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 798 (1961). Orders of the Administrator may be enforced by a district court. Act § 1007, 49 U.S.C. § 1007 (1958).

29. "A person should not be relegated to setting sail in a fragile bark, in order to seek adventure on a partially charted sea." Judge Holtzoff in *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 153, 160-61 (D.D.C. 1962).

to notice and hearing before the government can compel an act or take away a right—is a historical part of the development of Anglo-American law.³⁰ Thus, the very essence of an emergency action—withholding a hearing, and many times notice, until after the action is completed³¹—is on its face repugnant to due process. Yet, who would say that while the building is burning the firemen cannot destroy another building to prevent the spread of fire?³² Thus, we have an anomaly in our law.³³

“Emergency powers for the protection of health and safety in the face of immediate danger ought to be conceded, but they have no clear basis in our common law.”³⁴ Inroads have been made in the areas of public health and safety, public order, and the collection of revenue. They have come about by judicial abdication, statutory provisions, and the application of a doctrine of residual prerogative power in the government.³⁵ In continental countries summary action is customary.³⁶

B. Due Process Clause

The Supreme Court has held that summary actions by a state to abate the nuisance of illegal fishing nets³⁷ and to destroy food which is unfit for human consumption³⁸ did not conflict with the due process clause. While the Court has never established a general principle of emergency power for the federal government,³⁹ it has permitted the government to dispense with notice and hearing in situations which Congress has determined might give rise to an emergency situation.⁴⁰

Where only property rights are involved, mere postponement

30. See de Smith, *The Right to a Hearing in English Administrative Law*, 68 HARV. L. REV. 569 (1955).

31. As to a possible distinction between notice and no notice prior to the administrative action see HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 561 (2d ed. 1950).

32. See 1 DAVIS § 7.08. The community would not be able “to await the slow course of judicial proceedings” nor could it be expected that the legislature could anticipate all situations or make inflexible rules to govern emergencies. Powell, *Administrative Exercise of the Police Power* (pts. 1-3), 24 HARV. L. REV. 268, 333, 441 (1911). These emergency actions have been classified by text writers as the “summary abatement of nuisances.” See generally, FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY § 102 (1928); HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 548-89 (2d ed. 1950).

33. FREUND, *op. cit. supra* note 32, § 96.

34. *Id.* § 109, at 210. *Contra*, *Lawton v. Steele*, 152 U.S. 133, 142 (1894).

35. LEISERSON, ADMINISTRATIVE REGULATION 57 (1942). See generally DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 251-306 (1927).

36. For a discussion of German law see FREUND, *op. cit. supra* note 32, §§ 96-109.

37. *Lawton v. Steele*, 152 U.S. 133 (1894). For a view that this case should be limited to goods of small value, see SWENSON, FEDERAL ADMINISTRATIVE LAW 153 (1952).

38. *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).

39. *In re Naegle*, 135 U.S. 1 (1890), permitting the President to issue an order, in the absence of a statute, for the Department of Justice to protect Justice Field on his circuit travels, could have afforded the opportunity to establish a general principle of emergency power. FREUND, *op. cit. supra* note 32, § 96.

40. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (misbranded food); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (bank receiver); *Yakus v. United States*, 321 U.S. 414 (1944) (price controls); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (tax collection); 1 DAVIS § 7.08.

of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.⁴¹

While the constitution does not prohibit the procedure used in an emergency situation, the problem still remains as to whether the action taken was for a lawful purpose.⁴²

C. Certificates

Immediate action is also necessary when a certificate or license holder is in a position to jeopardize the safety of a large number of people.⁴³ The state of New York permitted a police commissioner to revoke summarily permits of airmen who piloted aircraft towing banners over a city. While recognizing the hardship of the individual case, the New York court upheld the action "as an exercise of the police power in protecting health and promoting the welfare of the community at large."⁴⁴

The Court of Appeals for the District of Columbia Circuit has held that the CAB could not suspend a non-safety certificate on an emergency basis without a provision in the Act.⁴⁵ In a latter case the court mentioned that a different result would have been reached if a safety regulation had been involved.⁴⁶

While the Supreme Court has not yet adjudicated the emergency provisions of the Act, *Fahey v. Mallonee*⁴⁷ would appear to indicate that the Court would uphold those provisions. In *Fahey* the Court permitted

41. *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931). See also *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281, 290 (D.C. Cir. 1948).

42. See PARKER, *ADMINISTRATIVE LAW* 34-35 (1952).

43. SCHWARTZ, *AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW* 122 (2d ed. 1962). See automobile driver license cases: *Thornhill v. Kirkman*, 62 So.2d 740 (Fla. 1953); *Commonwealth v. Walkinshaw*, 373 Pa. 419, 96 A.2d 384 (1953). See also the Pure Food and Drug Act which permits the immediate suspension of permits. 21 U.S.C. § 344(b) (1958).

44. *S.S. Pike Co. v. City of New York*, 169 Misc. 109, 6 N.Y.S.2d 957 (Sup. Ct. 1938). See also *Tatum v. City of Hallandale*, 71 So.2d 495 (Fla. 1954).

45. *Standard Airlines, Inc. v. Civil Aeronautics Bd.*, 177 F.2d 18 (D.C. Cir. 1949). Professor Davis criticizes the case on the basis that the court should have inquired into the reasons of the CAB for taking the immediate action. But Professor Davis read the words "of convenience and necessity" into the emergency provision of the statute, which was applicable only to safety certificates. 1 DAVIS § 7.08. Civil Aeronautics Act of June 23, 1938, ch. 601, § 609, 52 Stat. 1011.

The same court has permitted the CAB to issue an emergency order permitting an airline to receive financial assistance without a full hearing as required by statute. The record showed that the public interest required that the airline be kept in operation. The alleged harm was to the objecting competing airline only. *National Airlines, Inc. v. Civil Aeronautics Bd.*, 306 F.2d 753 (D.C. Cir. 1962).

46. *R. A. Holman & Co. v. Securities & Exch. Comm'n*, 299 F.2d 127, 132 n.9 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

47. 332 U.S. 245 (1947). See discussion in JAFFE, *ADMINISTRATIVE LAW* 303 (1953).

the Chairman of the Federal Home Loan Bank Board to appoint a conservator to take possession of a bank without a hearing. The order was justified on the grounds of giving protection to the public, because this was a customary procedure in dealing with a bank, and because the bank accepted its charter subject to the rules thereunder.

The Administrative Procedure Act⁴⁸ [hereinafter referred to as the APA] is applicable to the FAA.⁴⁹ Section 9(b) of the APA⁵⁰ exempts from the requirement of giving notice or an opportunity for compliance, license "cases of willfulness⁵¹ or those in which the public health, interest or safety requires otherwise." The legislative history of this section indicates an intent to have the provision operate "irrespective of the equities or injury to the licensee," but not to permit agencies to act arbitrarily.⁵² Because of the exception for public safety, section 9(b) of the APA might not be applicable to any portion of section 609 of the Act.⁵³

D. Tort Liability of the Administrator⁵⁴

In 1908 the Supreme Court, in permitting a state to summarily destroy food which was unfit for human consumption, suggested in dictum that the owner of the food would have a remedy for damages against the party seizing the food if it later was proven that there was an erroneous destruction.⁵⁵ The suggestion of suing a government officer later has been criticized because it would bankrupt honest officials, "chill" official enthusiasm for rigorous enforcement, and submit issues of expert judgment to lay juries.⁵⁶ It appears that the Supreme Court has never followed its own advice.⁵⁷ The federal courts have granted officers immunity from civil liability in the exercise of discretionary power, whether it be negligently⁵⁸ or intentionally⁵⁹ done.⁶⁰

48. 5 U.S.C. §§ 1001-11 (1958).

49. See Act § 1001, 49 U.S.C. 1481 (1958); APA § 12, 5 U.S.C. 1011 (1958).

50. 5 U.S.C. § 1008(b) (1958).

51. *Great Lakes Airlines, Inc. v. Civil Aeronautics Bd.*, 291 F.2d 354, 361 (9th Cir.), *cert. denied*, 368 U.S. 890 (1961); *Walker v. Civil Aeronautics Bd.*, 251 F.2d 954 (2d Cir. 1958); *Air Transport Associates, Inc. v. Civil Aeronautics Bd.*, 199 F.2d 181, 186 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

52. Current Material, *Ad. L. Statutes* 35, 82 (2d ser. 1951).

53. See John E. Clark, 23 C.A.B. 1013, 1025 (Initial decision 1956) (*semble*).

54. The FAA could not be sued because of the doctrine of sovereign immunity. See 3 DAVIS §§ 25.01-17. The Federal Tort Claims Act exempts discretionary functions. 28 U.S.C. § 2680(a) (1958). Compare *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), *with* *Dalehite v. United States*, 346 U.S. 15 (1953).

55. *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908). See generally 3 DAVIS §§ 26.01-07.

56. JAFFE, *ADMINISTRATIVE LAW* 309 (1953). See 3 DAVIS § 26.07.

57. 3 DAVIS § 26.05 n.10.

58. *Id.* § 26.01.

59. *Id.* § 26.04.

60. In *Jones v. Securities & Exch. Comm'n*, 298 U.S. 1 (1935), the SEC was held to have acted arbitrarily in not permitting the withdrawal of a registration statement. Thereafter, Jones sued the members of the SEC individually for conspiring to destroy his business

III. THE REMEDIES

A. *Common-Law Remedies*

Section 1106 of the Act⁶¹ provides:

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

The applicability of this section is probably limited to suits between private parties in the field of aviation which do not involve the Act.⁶² Furthermore, a common-law remedy could not be used when the effect would be to render the provisions of the Act nugatory.⁶³

Section 10(b) of the APA⁶⁴ provides that in the absence or inadequacy of the statutory review, relief may be obtained by "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." Congress intended this provision to be a "recognition of the so-called common-law actions as being appropriate and authorized means of judicial review."⁶⁵

The common-law extraordinary writs⁶⁶ of mandamus,⁶⁷ prohibition,⁶⁸ quo warranto,⁶⁹ certiorari,⁷⁰ and habeas corpus⁷¹ would by definition

by not permitting his withdrawal of registration. Jones alleged their acts were malicious and in bad faith. The case was dismissed for failure to state a claim upon which relief could be granted. "The fact that the Commission misjudged the exact confines of its jurisdiction over registration statements . . . to which two [lower] courts and three Supreme Court Justices [dissenting] agreed, is a long way from acting palpably beyond the duties of an office. It is the normal, necessary thing for an administrative body to make that type of determination in the first instance." *Jones v. Kennedy*, 121 F.2d 40, 43 (D.C. Cir.), *cert. denied*, 314 U.S. 665 (1941).

61. 49 U.S.C. § 1506 (1958). See 4 DAVIS § 28.03, for a discussion of the statement Justice Frankfurter made dissenting in *Starke v. Wickard*, 321 U.S. 288, 312 (1944): "There is no such thing as a common law of judicial review in the federal courts."

62. See *Southeastern Aviation, Inc. v. Hurd*, 6 Av. Cas. 18, 262 (Tenn. Ct. App. 1960).

63. *Cf. Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907).

64. 5 U.S.C. § 1009(b) (1958).

65. Current Material, Ad. L. *Statutes* 36, 83 (2d ser. 1951).

66. For judicial remedies today against administrative agencies see generally JAFFE & NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 778-801 (1961); PARKER, *ADMINISTRATIVE LAW* 271-77 (1952); SWENSON, *FEDERAL ADMINISTRATIVE LAW* 215-33 (1952). The legal profession has neglected and under-estimated the right to review agency action by common-law means. LAVERY, *FEDERAL ADMINISTRATIVE LAW* § 206 (1952).

67. Mandamus can be issued only for a ministerial act, where there is no room for discretion. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Peters) 524 (1838).

68. Prohibition is used to curb excess of jurisdiction by tribunals of limited jurisdiction. *United States ex rel. Denholm & McKay Co. v. United States Bd. of Tax Appeals*, 125 F.2d 557 (D.C. Cir. 1942).

69. Quo warranto is used for trying title to an office or the right to exercise a public franchise. SWENSON, *FEDERAL ADMINISTRATIVE LAW* 217 (1952).

70. Certiorari is used only for reviewing judgments of inferior tribunals where there is no other method of review. It is not used by federal courts to review administrative orders. *Dege v. Hitchcock*, 229 U.S. 162 (1913).

71. Habeas corpus may only be used when there is a physical restraint of an individual. SWENSON, *FEDERAL ADMINISTRATIVE LAW* 218 (1952).

not be applicable to the emergency orders of the Administrator. In addition, the federal courts are reluctant to employ the writs of prohibition,⁷² certiorari,⁷³ and quo warranto.⁷⁴ A mandamus action could lie⁷⁵ to compel the CAB to dispose of the appealed order without unreasonable delay.⁷⁶

Injunctions and declaratory judgments,⁷⁷ usually in a combined form,⁷⁸ have become acceptable means of reviewing administrative action. The use of an injunction would solve the problems of certificate holders. The Administrator would be restrained from enforcing his emergency order, and he would have to follow the procedures for non-emergency orders if he desired to take action on the certificate.

B. Injunctions

An injunction may be issued when there is a threat of irreparable injury—the loss of business, and an inadequate remedy at law—and no provision for judicial review.⁷⁹

*But the injunction as a means of reviewing administrative action has moved away from its historical foundations in equity and has become a general-utility remedy for use whenever no other form of review proceeding is clearly indicated. Courts frequently omit all inquiry into satisfaction of the requisites of equity jurisdiction.*⁸⁰

However, the chances for the certificate holder to secure injunctive relief are remote. An injunction does not lie when the public interest is paramount to any threatened loss or damage.⁸¹

72. 3 DAVIS § 23.13.

73. *Id.* § 23.14.

74. SWENSON, *FEDERAL ADMINISTRATIVE LAW* 216 (1952).

75. It is questionable whether courts outside the District of Columbia can issue mandatory relief against the federal government. See 3 DAVIS § 23.10. Rule 81(b) of the Federal Rules of Civil Procedure, abolishing the *writ* of mandamus, has not abolished the *relief*. *Ibid.* See 28 U.S.C. § 1651 (1958).

76. See APA §§ 6(a), 10(e)(A), 5 U.S.C. §§ 1005(a), 1009(e)(A) (1958); *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961).

77. 28 U.S.C. § 2201 (1958). "[T]he Declaratory Judgment Act is not an independent source of federal jurisdiction; . . . the availability of such relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). For a view that declaratory judgments should be used more frequently in administrative law as a form of judicial review see Lavery, *The Declaratory Judgment in Administrative Law*, 14 F.R.D. 479 (1953).

78. 3 DAVIS § 23.04.

79. See WALSH, *EQUITY* § 41 (1930).

80. 3 DAVIS § 23.04, at 308. (Emphasis in original.) When the FAA or CAB seek an injunction under the Act for enforcement of an order it is not necessary to show irreparable injury since the right to an injunction is specifically conferred by section 1007(a) of the Act. *Civil Aeronautics Bd. v. Modern Air Transport, Inc.*, 81 F. Supp. 803 (S.D.N.Y. 1949), *aff'd*, 179 F.2d 622 (2d Cir. 1950).

81. *Air Line Pilots Ass'n v. Quesada*, 182 F. Supp. 595 (S.D.N.Y.), *aff'd*, 276 F.2d 892 (2d Cir. 1960).

In *Ewing v. Mytinger & Casselberry, Inc.*⁸² the Food and Drug Administrator made multiple seizures of misbranded articles. The applicable statute⁸³ permitted the Administrator to act in that manner when he has "probable cause to believe from facts found" that the article was mislabeled. Even though it was not shown that the seized articles were unhealthy, Justice Douglas, speaking for the majority, held that to issue an injunction would interfere with the speedy protection Congress provided for in the statute. The Court considered it immaterial that the Administrator's action caused irreparable damage to a business. The Administrator's determination of probable cause was considered conclusive on that issue, similar to a grand jury indictment or a prosecutor's information. Justice Jackson in a dissent, to which Justice Frankfurter said he must "yield," said that no emergency was shown, and that the government tried to destroy a business by the suits resulting from multiple seizures.

Judicially created limitations that might be imposed when injunctive relief is sought are ripeness for review,⁸⁴ primary jurisdiction,⁸⁵ and exhaustion of administrative remedies.⁸⁶ It is not sufficient to give a court jurisdiction if there is nothing more the certificate holder can do within the agency as to the alleged irreparable injury.⁸⁷ Moreover, the Administrator's "powers are obviously exclusive so far as the administration of the Act is concerned."⁸⁸

The chances to reverse on appeal an order denying an injunction,⁸⁹ or to have the agency's order stayed pending judicial review,⁹⁰ are

82. 339 U.S. 594 (1950), 19 GEO. WASH. L. REV. 531 (1951), *reversing* 87 F. Supp. 650 (D.D.C. 1949), 25 N.Y.U.L. REV. 642 (1950).

83. 21 U.S.C. § 334(a) (1958).

84. There must be a *final* order by the agency. *McManus v. Civil Aeronautics Bd.*, 286 F.2d 414 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961); APA § 10(c), 5 U.S.C. § 1009(c). See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); 3 DAVIS §§ 21.01-10.

85. The agency rather than the court should make the *initial* decision. See *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Isner v. Interstate Commerce Comm'n*, 90 F. Supp. 361 (E.D. Mich. 1950); 3 DAVIS §§ 19.01-09. "[O]nly where the particular agency has the authority to grant the relief requested by plaintiff [should] the primary jurisdiction doctrine bar recourse to the courts." Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495, 503-04 (1953).

86. All administrative remedies must be pursued before seeking judicial review. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); 3 DAVIS §§ 20.01-10. As to whether this is a discretionary rule, compare *Smith v. United States*, 199 F.2d 377, 381 (1st Cir. 1952), with *Red River Broadcasting Co. v. Federal Communications Comm'n*, 98 F.2d 282, 284 nn.4-5 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 625 (1939).

87. *Avon Dairy Co. v. Eisaman*, 69 F. Supp. 500 (N.D. Ohio 1946).

88. *Twentieth Century Airlines, Inc. v. Ryan*, 74 Sup. Ct. 8, 11 (Reed, Circuit Justice, 1953) (CAB economic certificate).

89. There is no right to an injunction or a stay of an agency order when the case is on appeal, even if irreparable injury may result. "It is an exercise of judicial discretion." *Virginian R.R. v. United States*, 272 U.S. 658, 672 (1926).

90. Section 10(d) of the APA provides for interim relief in the form of staying an agency order by the reviewing court when "necessary to prevent irreparable injury." 5 U.S.C. § 1009(d) (1958). See *Brown v. Civil Aeronautics Authority*, 112 F.2d 737 (9th Cir. 1940).

remote since one of the conditions which is usually required to be met is that there be no harm to the public interest.⁹¹ If interlocutory relief is to be granted, the FAA must receive at least five days notice prior to the court's granting of relief.⁹² The denial of an injunction does not prevent the certificate holder from later receiving judicial review by the statutory method after the CAB enters a final order.⁹³

C. Statutory Judicial Review

Judicial review of the final CAB order might not be an adequate remedy since the emergency aspect of the order is likely to be considered moot on appeal.⁹⁴ However, it has been held that when the specific issue has become moot, the court will still decide the general question which may recur.⁹⁵ When judicial review is sought, the court is bound by the FAA's or CAB's findings of fact if they are supported by "substantial evidence."⁹⁶

Section 1006 of the Act⁹⁷ provides for judicial review of an order of the Administrator or the CAB. Subsection (a) provides that "any order . . . shall be subject to review by the courts of appeals." Subsection (d) provides that "upon transmittal of the petition [for review] to the Board or Administrator, the court shall have exclusive jurisdiction." Thus a literal reading of the section would mean that *any* order, including an emergency order, is subject to judicial review. However, that clause has been interpreted to require the issuance of a *final* order.⁹⁸ Further, it is unclear if the word "shall" in subsection (a) is an exclusive grant of jurisdiction, or if it gives the court of appeals jurisdiction in addition to the district courts that would normally have jurisdiction under the APA.⁹⁹ It should be noted that the "exclusive

91. *Associated Sec. Corp. v. Securities & Exch. Comm'n*, 283 F.2d 773 (10th Cir. 1960); *Davis v. Travelers Ins. Co.*, 261 F.2d 830 (5th Cir. 1958); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

92. Act § 1006(d), 49 U.S.C. § 1486(d) (1958).

93. *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961); *Tyler Gas Serv. Co. v. Federal Power Comm'n*, 247 F.2d 590 (D.C. Cir.), *cert. denied*, 355 U.S. 895 (1957).

94. See *Brown v. Civil Aeronautics Authority*, 119 F.2d 172 (9th Cir. 1941). In *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588 (5th Cir. 1962), *petition for cert. filed*, 31 U.S.L. WEEK 3221 (U.S. Jan. 3, 1963) (No. 719), the court did discuss certain aspects of the emergency order although it was the final order which was before the court. See also *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 153 (D.D.C. 1962).

95. *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). *Contra*, *Eastern Air Lines, Inc. v. Civil Aeronautics Bd.*, 341 U.S. 901 (1951) (mem.), *vacating and remanding to dismiss as moot* 185 F.2d 426 (D.C. Cir. 1950) (economic certificate).

96. Act § 1006(e), 49 U.S.C. § 1486(e); *Nebraska Dep't of Aeronautics v. Civil Aeronautics Bd.*, 298 F.2d 286 (8th Cir. 1962). See APA § 10(e)(B)(5), 5 U.S.C. § 1009(e)(B)(5) (1958); *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474 (1951).

97. 49 U.S.C. § 1486 (1958).

98. *McManus v. Civil Aeronautics Bd.*, 286 F.2d 414 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961).

99. APA § 10, 5 U.S.C. § 1009. See *City of Dallas v. Rentzel*, 172 F.2d 122 (5th Cir.), *cert. denied*, 338 U.S. 858 (1949).

jurisdiction" clause of subsection (d) is not applicable until *after* the petition for review is filed in the court of appeals. But a similar provision applicable to the Federal Trade Commission¹⁰⁰ has been interpreted to mean that the court of appeals *is* the exclusive reviewing court.¹⁰¹

IV. THE PROPER COURT

A. *Court of Appeals*

A court of appeals has equity powers¹⁰² and can issue a temporary injunction to prevent its losing jurisdiction of an administrative order.¹⁰³ The court will not, however, hear a petition under the review provisions of the Act when there was no quasi-judicial proceeding at which evidence was presented, since there would be no intelligible basis for the court to arrive at a decision.¹⁰⁴ Since the court of appeals has no original jurisdiction to decide a case,¹⁰⁵ it is doubtful whether review could be obtained on the Administrator's ex parte order.

In order for the court of appeals to take jurisdiction under section 1006, it must be shown to the court that the Administrator's order was intended by Congress to come within that section.¹⁰⁶ If the court of appeals has jurisdiction under the Act, any circuit in which the petitioner resides, or has his principal place of business, or the Court of Appeals for the District of Columbia Circuit would be proper.¹⁰⁷

The judicial review provisions of the APA¹⁰⁸ are not applicable to the court of appeals.¹⁰⁹ The APA does give jurisdiction to the district court, and the Court of Appeals for the District of Columbia has suggested, in a case where the CAB order was not final, that the district court would have original jurisdiction.¹¹⁰

B. *District Court*

If the court of appeals dismisses the petition on the basis that the court has no jurisdiction, the action is *not* barred from being brought in

100. 15 U.S.C. § 45(d) (1958).

101. *Aron v. Federal Trade Comm'n*, 50 F. Supp. 289 (E.D. Pa. 1943). The same result would probably apply to a FAA order. See *Alexander v. Civil Aeronautics Bd.*, 2 Av. Cas. 14,481 (E.D.N.Y. 1947).

102. *National Labor Relations Bd. v. Boss Mfg. Co.*, 107 F.2d 574, 579 (7th Cir. 1939); 3 DAVIS § 23.03. The equitable doctrine of unclean hands is not applicable to judicial review. *Door v. Donaldson*, 195 F.2d 764 (D.C. Cir. 1952).

103. *Cf. Board of Governors of Fed. Reserve Sys. v. Transamerica Corp.*, 184 F.2d 311 (9th Cir.), *cert. denied*, 340 U.S. 883 (1950).

104. *Arrow Airways, Inc. v. Civil Aeronautics Bd.*, 182 F.2d 705 (D.C. Cir.) (per curiam), *cert. denied*, 340 U.S. 828 (1950), *incorporating by reference*, *United Gas Pipe Line Co. v. Federal Power Comm'n*, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950).

105. *Id.* (by implication). See 28 U.S.C. §§ 1291-94 (1958).

106. *City of Dallas v. Rentzel*, 172 F.2d 122 (5th Cir.), *cert. denied*, 338 U.S. 858 (1949).

107. Act § 1006(b), 49 U.S.C. § 1486(b) (1958).

108. APA § 10, 5 U.S.C. 1009 (1958).

109. *City of Dallas v. Rentzel*, *supra* note 106.

110. *Arrow Airways, Inc. v. Civil Aeronautics Bd.*, *supra* note 104.

the district court.¹¹¹ The district court must take jurisdiction if the complaint on its face asks for injunctive relief even if there is no merit to the claim.¹¹² The judicial code gives the district courts original jurisdiction of any action arising under an act of Congress regulating commerce.¹¹³ But that statute has been held inapplicable when Congress has provided otherwise for judicial review of an agency's action.¹¹⁴

Section 10(c) of the APA¹¹⁵ emphasizes that an action must be "final" prior to judicial review. However, the legislative history of that section indicates that an administrative action is considered "final" as long as it remains effective while the administrative process is being exhausted and there is no other adequate remedy in any court.¹¹⁶

After the CAB has entered an order upholding the Administrator's order, the district court will not take jurisdiction.¹¹⁷ No reported case has been decided as to whether a district court can take jurisdiction over FAA certificate orders.¹¹⁸ However, in an analogous situation, a district court took jurisdiction to decide if an injunction should be issued to delay the effective date of a FAA regulation forbidding commercial air carriers from utilizing pilots over sixty years of age. While the court denied the injunction and the court of appeals affirmed, neither discussed the district court's jurisdiction.¹¹⁹

Several regulatory agencies, like the National Labor Relations Board,¹²⁰ have judicial review provisions in their statutes similar to section 1006 of the Act. In *Myers v. Bethlehem Shipbuilding Corp.*,¹²¹ the Supreme Court held that the district court was without jurisdiction to enjoin NLRB hearings since there was exclusive review in the court of appeals. Yet the *Myers* case¹²² and subsequent cases¹²³ indicate that the district court does have jurisdiction when the agency's action is unconstitutional,¹²⁴ contravenes a specific provision of the statute,¹²⁵ or interferes with United States foreign policy.¹²⁶

111. *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939).

112. *Ibid.*

113. 28 U.S.C. § 1337 (1958).

114. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300 (1943).

115. 5 U.S.C. § 1009(c) (1958).

116. Current Material, Ad. L. *Statutes* 36, 83 (2d ser. 1951). See generally 3 DAVIS § 20.08.

117. *Alexander v. Civil Aeronautics Bd.*, 2 Av. Cas. 14,481 (E.D.N.Y. 1947).

118. *But cf. World Wide Airlines, Inc. v. Lee*, 4 Av. Cas. 17,406 (S.D. Cal. 1954).

119. *Air Line Pilots Ass'n v. Quesada*, 182 F. Supp. 595 (S.D.N.Y.), *aff'd*, 276 F.2d 892 (2d Cir. 1960).

120. 29 U.S.C. § 160(f) (1958).

121. 303 U.S. 41 (1938).

122. *Id.* at 47.

123. *E.g., Consolidated Edison Co. v. McLeod*, 302 F.2d 354 (2d Cir. 1962).

124. *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949).

125. *Leedom v. Kyne*, 358 U.S. 184 (1958).

126. *Empresa Hondurena de Vapores, S. A. v. McLeod*, 300 F.2d 222 (2d Cir.), *cert. granted*, 370 U.S. 915 (1962).

A district court asked to enjoin the Federal Trade Commission declined jurisdiction on the basis that the court of appeals had exclusive jurisdiction under the statute;¹²⁷ and in addition, since the enabling statute provided for judicial review,¹²⁸ neither a district court nor a court of appeals could enjoin a statutory proceeding by the agency.¹²⁹

In *Ewing v. Mytinger & Casselberry, Inc.*,¹³⁰ the Supreme Court held that the district court had no jurisdiction to review seizures by the Food and Drug Administrator. The court pointed out that the agency's determination of probable cause was not intended by Congress to be reviewable.

Section 301(c) of the Act¹³¹ provides:

The principal office of the [Federal Aviation] Agency shall be in or near the District of Columbia, but it may act and exercise all its power at any other place. The Agency shall have an official seal which shall be judicially noticed.

A court will take judicial notice that the seal of an agency is located in the District of Columbia.¹³² Thus, the argument is made that the official residence of the Administrator is in the District of Columbia, and he may be sued only in a District of Columbia court for acts committed in his official capacity.¹³³

1. THE ADMINISTRATOR AS AN INDISPENSABLE PARTY¹³⁴

The FAA has decentralized its operations and maintains seven regional offices headed by assistant administrators.¹³⁵ As a practical matter, an emergency order would probably be issued from the regional office in the vicinity where the violations were taking place. Since the certificate-holder usually resides within that region, he would find it more convenient to bring an action where the regional office is located rather than in the District of Columbia. Even in situations where the regional administrator institutes the action against the certificate holder, the regional administrator probably could not be sued without joining the

127. 15 U.S.C. § 45(d) (1958).

128. 15 U.S.C. § 45(c) (1958).

129. *Aron v. Federal Trade Comm'n*, 50 F. Supp. 289, 290 (E.D. Pa. 1943).

130. 339 U.S. 594 (1950).

131. 49 U.S.C. § 1341(c) (1958).

132. *Bradley Lumber Co. v. National Labor Relations Bd.*, 84 F.2d 97 (5th Cir.), *cert. denied*, 299 U.S. 559 (1936).

133. See *World Wide Airlines, Inc. v. Lee*, 4 Av. Cas. 17,406 (S.D. Cal. 1954).

134. The problem of what happens when the Administrator leaves office while a suit is pending will not be discussed. See *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897); 3 DAVIS § 27.09.

135. FEDERAL AVIATION AGENCY, STATISTICAL HANDBOOK OF AVIATION 1-2 (1961); FEDERAL AVIATION AGENCY, THIRD ANNUAL REPORT 45 (1961). The regional offices are located in: Anchorage, Atlanta, Fort Worth, Honolulu, Kansas City, Los Angeles, and New York City.

Administrator as an indispensable party.¹³⁶ Failure to join an indispensable party is a ground for dismissal.¹³⁷

Sections 609 and 1005 of the Act vest all authority for emergency orders in the Administrator. Section 303(d)¹³⁸ permits the Administrator to delegate functions, but all delegates are "under his jurisdiction." The Supreme Court said in a case involving the Postmaster General:

[T]he superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.¹³⁹

Thus, if the acts of the regional administrator are performed as if done by the Administrator, the Administrator is an indispensable party.¹⁴⁰ Further, even if the regional administrator was enjoined, without the Administrator being joined as a party, nothing would prevent the Administrator from issuing a new emergency order.¹⁴¹ A court of equity will not do a futile act.¹⁴²

2. JURISDICTION OVER THE ADMINISTRATOR

If the Administrator is an indispensable party, then he must be named as a defendant to the suit and the court must be able to secure jurisdiction over him.¹⁴³ The court cannot secure jurisdiction over the Administrator, when his headquarters are in the District of Columbia, by service on a regional administrator.¹⁴⁴ A regional administrator probably could be sued locally if he was acting without authority from either the agency or the enabling statute.¹⁴⁵

Jurisdiction may not be remedied when the suit is brought outside

136. An indispensable party is one without which the court cannot enter a "just and equitable judgment." 3 MOORE, FEDERAL PRACTICE ¶ 21.04, at 2906 (2d ed. 1948). See generally 3 DAVIS § 27.08.

137. FED. R. CIV. P. 12(b)(7).

138. 49 U.S.C. § 1344(d) (1958).

139. *Williams v. Fanning*, 332 U.S. 490, 493 (1947).

140. See *Gnerich v. Rutter*, 265 U.S. 388, 391 (1924).

141. Compare *Shaughnessy v. Pedreiro*, 349 U.S. 48, 53 (1955).

142. See LEWIS & SPELLING, *THE LAW OF INJUNCTIONS* (1926); WALSH, *EQUITY* § 64 (1930).

143. See FED. R. CIV. P. 12(b)(2).

144. *Alexander v. Civil Aeronautics Bd.*, 2 Av. Cas. 14,481 (E.D.N.Y. 1947); *accord*, *Bradley Lumber Co. v. National Labor Relations Bd.*, 84 F.2d 97 (5th Cir.), *cert. denied*, 299 U.S. 559 (1936); *Napier v. Veterans Administration*, 187 F. Supp. 723 (D.N.J. 1960), *aff'd*, 298 F.2d 445 (3d Cir. 1962) (service on regional attorney); *Regina Cargo Airlines, Inc. v. Civil Aeronautics Bd.*, 10 F.R.D. 628 (E.D.N.Y. 1950); *Olin Industries, Inc. v. National Labor Relations Bd.*, 72 F. Supp. 225 (D. Mass. 1947); *Peoples Bank v. Federal Reserve Bank*, 58 F. Supp. 25 (N.D. Cal. 1944), *appeal dismissed*, 149 F.2d 850 (9th Cir. 1945). See also FED. R. CIV. P. 4.

145. *Bradley Lumber Co. v. National Labor Relations Bd.*, *supra* note 144, at 99 (dictum).

the District of Columbia by personally serving the Administrator in the District.¹⁴⁶ Nor is service proper by leaving the summons at the personal home of the Administrator when his home is within the court's jurisdiction;¹⁴⁷ nor by securing personal service on the Administrator when he physically comes into that particular jurisdiction.¹⁴⁸ A court may not enter an injunction against an agency on the assumption that it has jurisdiction,¹⁴⁹ but it is undecided if a court could authorize substituted service on the Administrator.¹⁵⁰

Even if jurisdiction over the Administrator is obtained in a court outside the District of Columbia, a motion to dismiss for improper venue is appropriate.¹⁵¹ In a case based upon a federal question, venue is where the defendant resides.¹⁵² The District of Columbia is considered the official residence for officers of the United States and they cannot be sued outside the District of Columbia without their consent.¹⁵³ The fact that the Administrator can bring suit in any district court¹⁵⁴ is immaterial.¹⁵⁵

V. DISCRETIONARY ACTION

A. *In General*

Since *Marbury v. Madison*¹⁵⁶ it has been recognized that the courts cannot review discretionary acts of the President. But it also has been recognized that a lesser official "is amenable to the laws for his conduct, and cannot, at his discretion, sport away the vested rights of others."¹⁵⁷

146. *Heiser Ready Mix Co. v. Fenton*, 265 F.2d 277 (7th Cir. 1959); *Berlinsky v. Woods*, 178 F.2d 265 (4th Cir. 1949) *cert. denied*, 339 U.S. 949 (1950); *Napier v. Veterans Administration*, *supra* note 144.

147. *Garden Homes, Inc. v. Mason*, 238 F.2d 651 (1st Cir. 1956). *But see* *Royal Farm Dairy, Inc. v. Wallace*, 7 F. Supp. 560 (D. Md. 1934) (*semble*). As to obtaining jurisdiction by attachment of realty in a state court see *Garden Homes v. Mason*, 142 F. Supp. 744 (D.N.H.), *appeal dismissed*, 238 F.2d 654 (1st Cir. 1956).

148. *Martinez v. Seaton*, 285 F.2d 587 (10th Cir.), *cert. denied*, 366 U.S. 946 (1961); *Royal Farms Dairy, Inc. v. Wallace*, 7 F. Supp. 560 (D. Md. 1934).

149. *Eighth Regional War Labor Bd. v. Humble Oil & Ref. Co.*, 145 F.2d 462 (5th Cir. 1944), *cert. denied*, 325 U.S. 883 (1945).

150. See *Fahey v. Mallonee*, 332 U.S. 245 (1947). If judicial review is provided for by statute in a district court outside the District of Columbia, then substituted service is proper. See procedure for securing substituted service outlined in *Davis v. Flemming*, 23 F.R.D. 139 (W.D. Mo. 1959).

151. See *Blackmar v. Guerre*, 342 U.S. 512 (1952); *FED. R. CIV. P.* 12(b)(3).

152. 28 U.S.C. § 1391(b) (1958).

153. *Mission Beverage Co. v. Porter*, 72 F. Supp. 568 (N.D.N.Y. 1947). A government agency, even if referred to as a "body corporate," is not "doing business" within the meaning of 28 U.S.C. § 1391(c) (1958), permitting venue where a corporation is doing business. *Isner v. Interstate Commerce Comm'n*, 90 F. Supp. 361 (E.D. Mich. 1950).

154. Act § 1007, 49 U.S.C. § 1487 (1958).

155. See *Smart v. Woods*, 184 F.2d 714 (6th Cir. 1950), *cert. denied*, 340 U.S. 936 (1951).

156. 5 U.S. (1 Cranch) 137 (1803). A more recent case is *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940).

157. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

However, language is frequently found to the effect that "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."¹⁵⁸

Section 10(e) of the APA¹⁵⁹ provides that agency action may be set aside when it is found to be "arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law." However, all parts of Section 10 are prefaced by the exception to judicial review so far as "agency action is by law committed to agency discretion." Thus, Section 10 says simultaneously that an abuse of discretion is reviewable but that acts which are committed to agency discretion are not reviewable.¹⁶⁰ The intent of Congress was probably to limit review of discretionary acts to the issue of abuse of discretion.¹⁶¹ The District of Columbia Circuit has adopted that view.¹⁶² On the other hand the Ninth Circuit has construed the APA literally, resulting in the withholding of judicial review of discretionary acts.¹⁶³ However, the Ninth Circuit has held that if the act of discretion is one which the courts have frequent occasion to consider, and one with respect to which the agency has no superior opportunity for knowledge, then the action is reviewable.¹⁶⁴

B. EMERGENCY SITUATIONS¹⁶⁵

In *Ewing v. Mytinger & Casselberry, Inc.*,¹⁶⁶ the Supreme Court in permitting the Food and Drug Administrator to seize misbranded articles said:

Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.¹⁶⁷

158. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

159. 5 U.S.C. § 1009(e) (1958).

160. See 3 DAVIS § 28.16. This has been referred to as "one of the most poorly drawn provisions of the APA." Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U.L. REV. 1173, 1246 (1954). See also Blachly, *Critique of the Federal Administrative Procedure Act*, in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 30, 55 (Warren ed. 1947).

161. Schwartz, *supra* note 160, at 1249.

162. *Homovich v. Chapman*, 191 F.2d 761, 764 (D.C. Cir. 1951).

163. *Sellas v. Kirk*, 200 F.2d 217 (9th Cir.), *cert. denied*, 345 U.S. 940 (1953).

164. *National Labor Relations Bd. v. Guy F. Atkinson Co.*, 195 F.2d 141, 150-51 (9th Cir. 1952).

165. The Privy Council in England upheld an act permitting the Colonial Governor of Cyprus to declare a state of emergency and to make "such regulations as appear to him to be necessary or expedient for securing the public safety." It was enough that the Governor was satisfied that there were grounds on which he might use his emergency powers. *Ross-Clunis v. Papadopoulos*, [1958] 1 Weekly L.R. 546 (P.C.), 21 MODERN L. REV. 411.

166. 339 U.S. 594 (1950).

167. *Id.* at 599. See also *Yakus v. United States*, 321 U.S. 414 (1944).

Justice Frankfurter dissented on the ground that the petitioner should be given an opportunity by the courts to prove that there was an abuse of discretion.

The lower Federal courts have followed the majority rationale of *Ewing*. A district court granted an injunction when it found that no emergency existed warranting the Federal Home Loan Bank Board to appoint a conservator for a bank without notice or hearing. The Third Circuit Court of Appeals reversed on the basis that "on its face the statute gives the Board an absolute discretion."¹⁶⁸ Likewise, the District Court for the District of Columbia refused to restrain government officials from seizing drugs alleged to be unsafe. The court pointed out that when discretion is involved, it is the good faith of the official which is material, not whether his conclusions might be factually or legally erroneous.¹⁶⁹

VI. PREVENTIVE ADMINISTRATIVE PROCEEDINGS

A. *Expertise in Air Safety*

A corollary to agency discretion is the expertise of an agency.¹⁷⁰ An agency will not have its decisions inquired into by the reviewing court when they are based upon the agency's expert knowledge.¹⁷¹ Usually when a court substitutes its judgment for an administrative determination it is in a case involving constitutional, statutory, or procedural problems.¹⁷²

The President and Congress select an Administrator for the FAA whom they believe to be an expert in air safety.¹⁷³ The courts have recognized the expertise of the Administrator and the CAB.

Particularly in the field of safety regulations, which are inherently matters of opinion involving many complex and technical considerations, a court should not interfere with the expert judgment of the Board, absent a clear showing that the Board has acted beyond its power or otherwise improvidently.

But it would not be proper for [a judge] simply to substitute different views for those of the Board, duly reached in the

168. *Greater Del. Valley Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 262 F.2d 371, 374 (3d Cir. 1958).

169. *Merritt Corp. v. Folsom*, 165 F. Supp. 418, 421 (D.D.C. 1958). See also *Tidal Osage Oil Co. v. West*, 30 F.2d 737 (D.C. Cir.), *cert. denied*, 279 U.S. 855 (1929).

170. See *Moog Industries, Inc. v. Federal Trade Comm'n*, 355 U.S. 411 (1958). Compare *Securities & Exch. Comm'n v. Cogan*, 201 F.2d 78, 86 (9th Cir. 1952) (on rehearing).

171. *Moog Industries, Inc. v. Federal Trade Comm'n*, 355 U.S. 411 (1958); *Gray v. Powell*, 314 U.S. 402, 412 (1941); *Williamsport Wire Rope Co. v. United States*, 277 U.S. 537, 564-65 (1928).

172. 4 DAVIS § 30.07.

173. See Act §§ 301(a), (b), 49 U.S.C. §§ 1341(a), (b) (1958).

exercise of its expert judgment and responsibilities to the public.¹⁷⁴

The courts have recognized that in air safety the Administrator must be able to act speedily;¹⁷⁵ to use the remedy he sees fit,¹⁷⁶ even when it is "severe under the circumstances";¹⁷⁷ and to suspend certificates for reasons other than technical proficiency.¹⁷⁸ A district court has said that a complaint, for an injunction to delay the effective date of the maximum age of pilots, "borders on vulgarity" when the dollar loss of approximately forty pilots is weighed against the safety of an estimated 846,000 passengers who would be carried by these pilots if the injunction were granted.¹⁷⁹ The Ninth Circuit refused to stay a suspension order when one of the conditions of the order was to test the pilot before the suspension would be terminated, saying: "We cannot make an order to jeopardize the safety of the public."¹⁸⁰ It should be noted that in non-safety cases under the Act, courts have not given the CAB as much leeway in entering an order as they do in safety cases.¹⁸¹

The most recent case on air safety and the first case involving an emergency order¹⁸² under section 609 of the Act is *Nadiak v. Civil Aeronautics Bd.*,¹⁸³ decided in 1962 by the Fifth Circuit.¹⁸⁴ Nadiak's pilot certificate was revoked on an emergency basis after the FAA investigated his twelve years as a professional pilot when Nadiak contested a proposed sixty day suspension.¹⁸⁵ The court affirmed the CAB's

174. *Air Line Pilots Ass'n v. Civil Aeronautics Bd.*, 215 F.2d 122, 125-26 (2d Cir. 1954) (Harlan, Circuit Judge).

175. *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 897 (2d Cir. 1960).

176. *Wilson v. Civil Aeronautics Bd.*, 244 F.2d 773 (D.C. Cir.), *cert. denied*, 355 U.S. 870 (1957).

177. *Garber v. Civil Aeronautics Bd.*, 276 F.2d 321, 323 (2d Cir. 1960). See *Walker v. Civil Aeronautics Bd.*, 251 F.2d 954 (2d Cir. 1958).

178. *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588 (5th Cir. 1962), *petition for cert. filed*, 31 U.S.L. WEEK 3221 (U.S. Jan. 3, 1963) (No. 719); *Spect v. Civil Aeronautics Bd.*, 254 F.2d 905, 916 (8th Cir. 1958). As to airmen's licenses generally, see Annot., 78 A.L.R.2d 1150 (1961).

179. *Air Line Pilots Ass'n v. Quesada*, 182 F. Supp. 595, 596 (S.D.N.Y.), *aff'd*, 276 F.2d 892 (2d Cir. 1960).

180. *Brown v. Civil Aeronautics Authority*, 112 F.2d 737 (9th Cir. 1940).

181. See *American Air Transport v. Civil Aeronautics Bd.*, 98 F. Supp. 660 (D.D.C. 1951), *certificate dismissed*, 344 U.S. 4, *on remand*, 201 F.2d 189 (D.C. Cir. 1952). Compare *Standard Airlines, Inc. v. Civil Aeronautics Bd.*, 177 F.2d 18 (D.C. Cir. 1949), with *R. A. Holman & Co. v. Securities & Exch. Comm'n*, 299 F.2d 127, 132 n.9 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962). "[P]robably in no other industry do considerations of safety so affect the economic well-being of an industry as in air transportation." THOMAS, *ECONOMIC REGULATION OF AIR TRANSPORT* 48 (1951).

182. A previous case involved an airman who claimed that an emergency existed in flight as a defense to his violation of the Civil Air Regulations. *Spect v. Civil Aeronautics Bd.*, 254 F.2d 905 (8th Cir. 1958).

183. 305 F.2d 588 (5th Cir. 1962), *petition for cert. filed*, 31 U.S.L. WEEK 3221 (U.S. Jan. 3, 1963) (No. 719).

184. The opinion was written for a unanimous court by Circuit Judge Brown. Chief Judge Tuttle and Circuit Judge Bell were also on the bench.

185. The suspension would have deprived him of his Airline Transport Certificate. He

order upholding the FAA,¹⁸⁶ but was disturbed over what it called "the blunderbuss nature of the charges" brought by the FAA.¹⁸⁷ The court very carefully scrutinized the basis for the FAA's emergency order to make sure that there was no substance to Nadiak's claim that union pilots created the charges against him since he was one of the few remaining "scab" pilots with the airline.¹⁸⁸

In its entirety the *Nadiak* decision is favorable to the FAA. But it exemplifies the fact that the FAA can misuse its emergency powers and that the court, on review of the final order, will examine the procedures used.¹⁸⁹ It could be implied from the decision that if the Administrator used his emergency powers incorrectly, the final order would be set aside.¹⁹⁰

B. Jurisdictional Limitation on the Courts

The eventual review by the court of appeals does not give the certificate holder the remedy he desires, since he would be unable to use his certificate until he received a favorable ruling from the court. But is this judicially wrong? Can it not be said that Congress intentionally built this hardship into the Act? During World War II Congress enacted the Emergency Price Control Act,¹⁹¹ which prohibited the staying of any order during the review process. The Supreme Court upheld the procedure on the basis that "when justified by compelling public inter-

would still have had a Commercial Pilot Certificate which would permit him to work as a co-pilot. See 14 C.F.R. § 40.300 (1962).

186. Nadiak will be eligible to make application for another pilot certificate in one year. The purpose of the revocation is public safety, not punishment. *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588, 590 n.1 (5th Cir. 1962).

187. The FAA listed 23 charges against Nadiak. Among them were charges that he reported for duty two minutes prior to the scheduled departure time, that he carried a case of beer under his arm, and that he pushed a power mower across the ramp at Miami, Florida. Five of the charges involving "in flight" violations were considered substantial enough to warrant an emergency revocation.

It should be noted that when an order of revocation is not based on one fault standing alone, but a sum of findings of fault, if any one finding of fault contains error, the ultimate conclusion cannot stand. *Carey v. Civil Aeronautics Bd.*, 275 F.2d 518 (1st Cir. 1960).

188. *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588, 592 (5th Cir. 1962).

189. While we fully appreciate the zealotness of the Administrator in carrying out his assigned responsibilities of promoting safety in the air lanes and the practical problems in doing so within limited time schedules, fundamental notions of fair play dictate that one called upon to defend truly serious charges in an emergency proceeding ought not to have adjudication of such substantial matters exposed to the possibility of inflammatory contamination by stale or trivial incidents. *Id.* at 591.

190. The public—including judges who fly—has a vital interest in air safety. Responsibility for air safety has been placed in the administrative hands of those deemed by Congress to have an expert competence. Air safety was of primary importance in the adjudication of this case. The determination was that air safety would be promoted by the certificate revocation. After permissible credibility choices, the findings were that numerous regulations and rules of the air lanes—which must not be ignored or taken lightly—had been violated. Those findings were supported by substantial evidence in a hearing which was fair and regular. There it ends. *Id.* at 595.

191. January 30, 1942, ch. 26, 56 Stat. 23.

est the legislature may authorize summary action subject to later judicial review of its validity."¹⁹² Congress has also enacted statutes which provide for no judicial review.¹⁹³

It appears clear that the grant of emergency powers to the FAA does not violate the due process clause. The mode of review, if there is one, is by injunctive relief in the District Court for the District of Columbia. In *Ewing v. Mytinger & Casselberry, Inc.*,¹⁹⁴ which most closely parallels factually the instant situation, the Court held that a district court had *no jurisdiction* to review the probable cause determination of the Food and Drug Administrator: "At times a preliminary decision by an agency is a step in an administrative proceeding."¹⁹⁵ To have held otherwise would have been to destroy the effectiveness of the "speedy, preventive device" which Congress created for the protection of the public.¹⁹⁶

The *Ewing* case is a clear articulation of the rule that when Congress authorizes a preventive administrative proceeding to protect the public, a court has no jurisdiction to issue an injunction prior to the completion of the statutory remedies, regardless of allegations of irreparable injury. A fortiori, a court should lack jurisdiction to issue an injunction when the effect would be to permit unsafe aircraft or unqualified airmen to fly, endangering not only the lives of passengers, but also the safety of the populace on the ground below. This kind of situation is certainly more hazardous to the public's safety than mislabeled food which was not injurious to health. If any agency can show the need for securing injunctive relief in the courts it is the FAA. It is the public who will suffer irreparable injury if an air accident occurs because the suspended certificate holder continues his activities.¹⁹⁷ The proverbial barn door, which today is on an airplane hangar, is being closed by the FAA *before* the airplane gets out.

192. *Yakus v. United States*, 321 U.S. 414, 442 (1944).

193. No judicial review is permitted from a denial of veterans benefits. 38 U.S.C. § 211 (1958); *United States v. Mroch*, 88 F.2d 888 (6th Cir. 1937); *accord*, *Van Horne v. Hines*, 122 F.2d 207 (D.C. Cir.), *cert. denied*, 314 U.S. 689 (1941). *But see* *Wellman v. Whittier*, 259 F.2d 163, 167 (D.C. Cir. 1958) (dictum); *Hines v. United States ex rel. Marsh*, 105 F.2d 85 (D.C. Cir. 1939). See also APA § 10(1), 5 U.S.C. § 1009(1) (1958).

194. 339 U.S. 594 (1950).

195. *Id.* at 598.

196. *Id.* at 601.

197. Is it sound public policy to allow an interested party to cause even a short delay in cases where the very lives of the members of the community may be at stake? Does it not render the law absurd to say in one breath that public necessity justifies summary action without a prior administrative hearing, and in the next breath that an individual may delay proceedings by seeking a prior judicial hearing, while disaster may result from the substitution of the judgment of judges for that of health officers? Is this not rendered all the more absurd in communities where the public health services are manned by trained and experienced experts? Is it possible to segregate real emergency cases from abatement cases where no urgency exists, and where therefore an injunction might be tolerable? HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 568 (2d ed. 1950).

The CAB has recognized this view. The CAB will not review the emergency aspect of a certificate suspension and will dismiss a petition asking for review. The CAB "does not believe that it should attempt to delineate the various circumstances in which public safety may require suspension or revocation."¹⁹⁸ A court should adopt the same view.

Of course it is more convenient from a judicial standpoint for Congress to amend the Act to say that a court cannot use its equity powers when the Administrator determines an emergency exists under sections 609 or 1005.¹⁹⁹ But the legislative history of the Act, the recognition given by the courts to the discretion and expertise of the Administrator in air safety, and the practical considerations of protecting the safety of the public in a situation where it is impossible for the public to protect itself, should require a court to dismiss for lack of jurisdiction over the subject matter a complaint seeking injunctive or extraordinary relief against an emergency order of the FAA. This dismissal would be proper because the Administrator's order is a preventive administrative proceeding.

In construing the enforcement provisions of legislation . . . it is important to remember that courts and administrative agencies are collaborative "instrumentalities of justice," and not business rivals.²⁰⁰

198. Leonard J. Spect, 25 C.A.B. 859, 891, 893 (Order E-11159, 1957), *aff'd as to other orders*, 254 F.2d 905 (8th Cir. 1958); *accord*, Richard S. Ewing, 26 C.A.B. 816 (1957).

199. Professor Hart wonders if that type of statute would be constitutional. HART, *op. cit. supra* note 197, at 569. The *Ewing* case, decided the same year Hart's book was published, would appear to say—yes!

200. Justice Frankfurter in *United States v. Ruzicka*, 329 U.S. 287, 295 (1946).